United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4076

United States Court of Appeals

FOR THE SECOND CIRCUIT

NAZARETH REGIONAL HIGH SCHOOL,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that Nazareth Regional High School violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, and by bypassing the Union and dealing directly with the teachers as individuals regarding the fixing of initial terms and conditions of employment.

2. Whether substantial evidence on the record as a whole supports the Board's finding that Nazareth Regional High School violated Section 8(a)(1) of the Act by the acitivities of its supervisors in circulating anti-union letters and decertification petitions, and in threatening the teachers during a faculty religious service.

3. Whether substantial evidence on the record as a whole supports the Board's finding that Nazareth Regional High School violated Section 8(a)(3) of the Act by its decision not to renew the employment contract of teacher James Mirrione because of his union activities.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of Nazareth Regional High School (hereinafter "Nazareth"), the respondent below, to review and set aside an order of the National Labor Relations Board issued on February 24, 1976, and reported at 222 NLRB No. 156 (R. 59-80).[1] The Board has cross-applied for enforcement of its order. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, *et seq.*), since the unfair labor practices occurred in Brooklyn, New York.

I. THE BOARD'S FINDINGS OF FACT

The Board found that Nazareth violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, and by bypassing the Union and dealing directly with the teachers as individuals regarding the fixing of initial terms and conditions of employment. The Board further found that the Hald Association, the predecessor to Nazareth, also violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with information concerning the transition in operation and control of Nazareth High School.[2]

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[1] Record references ("R") are to pages of the printed appendix. "Tr." references are to the stenographic transcript of the hearing before the Administrative Law Judge; "GC Ex." and "R Ex." refer to the Board's and Nazareth's (respondent below) exhibits, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] This latter finding is not contested by Nazareth. Although the Board found that Hald violated the Act, it did not order a remedy directed to Hald because the requested information had become outdated (R. 76-77). The Board considers the bargaining order imposed upon Nazareth as successor an appropriate remedy for Hald's violation.

The Board also found that Nazareth violated Section 8(a)(3) of the Act by not rehiring teacher James Mirrione at the new school because of Mirrione's union activities. Finally, the Board found that Nazareth violated Section 8(a)(1) of the Act by the activities of its supervisors in circulating anti-union letters and decertification petitions, and in threatening the teachers during a faculty religious service. The facts upon which the Board based its findings are summarized below.

A. Background

Nazareth Regional Senior High School is a parochial high school located in Brooklyn, New York (R. 29). For some years the school had been jointly operated by the Roman Catholic Diocese of Brooklyn and the Henry M. Hald High School Association (hereinafter Hald), which was organized in 1972 by the Diocese to operate the Catholic high schools in Brooklyn and Queens, New York (R. 29-30, 60; Tr. 24). The Board in the past has found that the Diocese and Hald are alter egos and the joint employers of teachers in the Hald schools (R. 29).[3] This finding is not questioned here.

The Hald Association was party to a multischool collective bargaining agreement with the Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO (hereinafter "the Union") which covered the nine Hald schools, including Nazareth Diocesan High School, until August 31, 1974 (R. 30, 60; Tr. 67, GC Ex. 7). The Diocese and Hald have had a collective bargaining relationship with this bargaining representative since 1966 (R. 30). The Union represented a unit consisting of all "full-time, permanent lay teachers" employed at the nine member schools (R. 63; GC Ex. 7).

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[3] *Henry M. Hald High School Association and Roman Catholic Diocese of Brooklyn,* 216 NLRB 480 (1975); *Henry M. Hald High School Association, Roman Catholic Diocese of Brooklyn and Sister of Saint Joseph,* 216 NLRB 512 (1975); *Henry M. Hald High School Association,* 213 NLRB 415 (1974). See also *N.L.R.B.* v. *Roman Catholic Diocese of Brooklyn, 535 F.2d* 1387, 1388 (C.A. 2, 1976).

B. Nazareth is reorganized

In the later part of 1973 the Hald Association announced that effective August 31, 1974, it would cease direct operation and control of Nazareth Diocesan High School (R. 32, 60; Tr. 102). Operation and control was to be transferred to a "neighborhood community group," and the school was to be incorporated as Nazareth Regional High School under a lay board of trustees (R. 60-61). The Diocese agreed to turn over the school property to the independent lay board of trustees as long as the board agreed to operate a Catholic high school on the premises (R. Ex. 20). Preliminary incorporation of the new board of trustees and the transfer of the school property to the Board began in February or March, 1974 (Tr. 736-737). Although the New York State Board of Regents did not grant a charter to the board of trustees until June 28, 1974, initial steps for recruitment of faculty were taken in April of that year (Tr. 26, 38-39, 71-72, 738). The formal transfer of property from the Diocese to the board of trustees took place on August 16, 1974, and classes began at the reorganized school on September 5, 1974 (Tr. 72, 818-819, R Ex. 20).

C. Hald refuses to furnish information to the Union concerning the reorganization

The Union first learned of the proposed change in the status of Nazareth High School in December, 1973 (R. 32, 60; Tr. 102, 660). At that time Union President Robert Gordon called Brother Medard Shea, Assistant Superintendent for teacher personnel of both Hald and the Diocese (Tr. 23), and asked for an explanation of how the reorganization would affect the teachers then employed at Nazareth (R. 32; Tr. 104). Despite this and other repeated requests by Gordon for specific information over the following six months, Shea never furnished any information (R. 32, 61; Tr. 105-106, 116-120, 709-714). When Gordon wrote to the principal of Nazareth, Brother Matthew Burke, requesting this information, the only reply was from Shea, instructing Gordon to stay away from Burke (R. 32; Tr. 107, 719, R. 85).

D. Nazareth promises to hire all current faculty

Failing to receive any information from Hald or the principal, and having heard that Thomas Keenan was chairman of the board of trustees which would operate the new Nazareth Regional High School,[4] Gordon wrote to Keenan on March 17 claiming representative status for the Union and requesting a meeting (R. 33, 62; 86). When Keenan did not respond, Gordon telephoned him on March 25. During that conversation Keenan acknowledged that he was chairman of the board and also told Gordon the Union would hear from Nazareth's unidentified counsel. When Gordon asked who the lawyer was, Keenan refused to say, telling Gordon, "I don't understand what you're worried about though. We intend to rehire all of the people back. They will be retained next year" (R. 33, 62; Tr. 113, 724-729, 742-745). Not hearing from any counsel for Nazareth, Gordon wrote Keenan again on April 11 to confirm their earlier conversation (R. 87). Keenan's reply of April 30 disavowed any promise to rehire all current Nazareth teachers (R. 88).

E. Nazareth supervisors solicit signatures on an anti-union letter and decertification petition

Unable to obtain the necessary information from either the old or the new employer, the Union wrote directly to the parents of Nazareth students. The letter sent to the parents complained of the treatment the teachers were being accorded by the school authorities and sought the parents' help (R. 40). In response to this letter, two supervisors at Nazareth, Serpico and Holmes, drafted another letter addressed to the parents which criticized the Union officers and disassociated the signatories from the Union's complaints about treatment from the present and future governing authorities (R. 40, 66-67; 90). The supervisors participated in the soliciting of a total of 40 signatures from the faculty, including five who

[4] Keenan became acting chairman of the board of trustees in January, 1974 (Tr. 736).

were chairmen of departments and thus also supervisors (R. 40; Tr. 179-185, 346, 361, 367, 394).

After the start of the new school year, when the Union continued in its demand for recognition, Nazareth supervisors drafted a decertification petition and an antiunion statement in support of it, and solicited signatures on those documents from the faculty (R. 40, 67; Tr. 370-372, 396, 498-499, GC Ex. 21). The decertification petition filed October 18 shows the signatures of 22 teachers, six of those supervisory at that time (R. 40; R Ex. 1).

F. Nazareth deals directly with the teachers and unilaterally fixes the terms and conditions of employment

In April 1974, Keenan sent letters to 50 to 55 of the 65 to 70 faculty then teaching at Nazareth Diocesan requesting an indication of their interest in employment at the new Nazareth Regional school (R. 69; Tr. 38-47, R. 83). Enclosed with the letters was a standard employment agreement containing the terms and conditions of faculty employment at Nazareth Regional (R. 69-70; Tr. 46). Approximately ten responses from faculty members were deemed unacceptable by Burke, apparently because they contained references to union representation in addition to expressing interest in continuing employment (R. 69; Tr. 47-48, R Ex. 7). Those who submitted "unacceptable" responses were sent another letter from Keenan informing them that they must indicate whether they wanted to be employed at Nazareth Regional which "has no intention of being bound by the terms and conditions of employment which prevailed at a former school" (R. 69; 84).

Burke, as principal of the new school, completed selection of the faculty for Nazareth Regional sometime during the summer of 1974 (R. 65; Tr. 787-788). On June 20, after most faculty members were interviewed by Burke, and after most of the teachers had been informed that they were to be "re-hired" at Nazareth Regional, the Union again demanded

that Nazareth Regional recognize and bargain with it (R. 65; Tr. 120, R. 89). Nazareth did not respond to this demand (Tr. 120). During the beginning of August, the employment agreement executed by the board of trustees was forwarded to the selected faculty for their signatures (Tr. 785-786). The teachers so selected were offered employment for the school year commencing on September 1, 1974, on the basis of Nazareth's unilaterally imposed terms (R. 69).

G. Nazareth employs almost all of its predecessor's lay faculty

The new faculty at Nazareth Regional consisted almost entirely of the teaching complement previously working at Nazareth Diocesan. Of 55 lay teachers employed at Nazareth Regional on September 1, 49 were previously employed at Nazareth Diocesan; only six were newly hired (R. 63; Tr. 55-56, 605-607 GC Ex. 24 and 25).[5] Similarly, if departmental chairmen and coordinators are excluded, 38 of the lay faculty at Nazareth Regional (totalling 44 non-supervisory lay teachers) had come from the Diocesan faculty (R. 63; Tr. 603). Brother Matthew Burke, principal of Nazareth Diocesan for five years, became the new principal of Nazareth Regional (R. 63; Tr. 29). No substantial changes in the school's operation were instituted by the new board of trustees (R. 63; Tr. 30, 68, 74, 80-82).

H. Principal Burke threatens the teachers' freedom to engage in union activities or future strike action

On September 4, 1974, the returning teachers were gathered for a Mass at which Principal Burke spoke. Burke specifically referred to the faculty strike the previous year and stated that any such activities that were disruptive of a Christian community at Nazareth

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[5] This turnover in faculty was lower than normal; turnover among teachers at Nazareth Diocesan had averaged 10 to 15 teachers per year (R. 63; Tr. 802). In addition, of the eight religious teachers employed by Nazareth Regional on September 1, all were previously employed at Nazareth Diocesan (R. 63; GC Ex. 24 and 25). Nazareth Diocesan had employed a total of 67 lay teachers at one time or another during 1973-74 (GC Ex. 24).

Regional "would be dealt with swiftly and severely" (R. 42; Tr. 373-375, 380, 395-396, 400, 789-791, 811-812).

I. Nazareth fails to renew the contract of teacher and union activist James Mirrione

During his first year at Nazareth (1972-73), religion teacher James Mirrione received three favorable evaluations of his classroom performance (R. 117-122), and was rehired for another year by Burke after Burke told him he was happy with his performance (R. 73-74; Tr. 321). During the Union's four-week strike the following September (1973), Mirrione actively engaged in picketing and the drafting and distribution of union literature and was involved in some minor confrontations with nonstrikers (R. 43-44, 71; Tr. 190-202). He was elected the following November to be alternate at Nazareth Diocesan to Union Delegate Stephen Monroe (R. 44, 71; Tr. 191).

During March 1974 a "mini-marathon" was held in connection with a fund-raising drive for the new Nazareth Regional school. Mirrione refused to participate in the event because of the problems the union was having gaining cooperation from school authorities regarding information about the reorganization (R. 45, 71-72; Tr. 210-214, 328-331). Burke heard of this action and on March 28, 1974, wrote Mirrione a letter critical of it, which concluded (R. 45, 72; Tr. 304, R. 93):

> It is totally immaterial to me what your individual opinion might be. What I will not tolerate in this school, however, is a faculty member actively campaigning to enlist the support of other faculty members in not participating in an extremely important school concern.

Mirrione, unlike most other teachers, had not received Keenan's letter enclosing the employment agreement in April of 1974 (R. 72; Tr. 219). Mirrione wrote to Keenan about this and, failing to receive a reply, went to see Principal Burke. Union Delegate Monroe accompanied Mirrione, but Burke refused to allow Monroe to be present. When Mirrione asked Burke why he had not been informed of his status for the coming year, Burke simply said

"the Board Trustees has not offered you a position" (R. 72-73; Tr. 222-225, 421-424). A subsequent letter from Keenan, dated June 13, 1974, indicated only that there were no "available" positions for Mirrione at Nazareth Regional (R. 91). Neither Burke nor Keenan ever gave Mirrione any further reasons for his nonrenewal (R. 73; Tr. 222-226).

In October 1974, Mirrione was informed by Chaplain Hicks that two positions had opened in the school's theology department. Mirrione applied for these positions (R. 94-95), and received this response from Principal Burke: "There are no jobs available here at Nazareth Regional High School" (R. 92). It appears, however, that two vacancies were still available at that time - and that two new faculty members were hired that month (R. 73; Tr. 228, 305, 427-429, R. 100).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board, reversing the Administrative Law Judge, concluded that Nazareth, having succeeded to Hald's bargaining obligation, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and by by-passing the Union and dealing directly with the teachers concerning their future working conditions. The Board also concluded that Nazareth violated Section 8(a)(1) of the Act by the actions of its supervisors in filing a decertification petition, in soliciting signatures on antiunion letters, and in making antiunion statements during a faculty religious service. Finally, the Board concluded that Nazareth violated Section 8(a)(3) of the Act by refusing to renew the contract of teacher James Mirrione at least in part because of his union activities (R. 42, 66-67, 70, 75).

The Board's order requires Nazareth to cease and desist from the unfair labor practices found and from "in any other manner" interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the Board's order requires Nazareth

to recognize and bargain with the Union, to make restitution to the employees for any wages and benefits lost by virtue of its unilateral implementation of terms and conditions of employment, to offer James Mirrione reinstatement to his former job, to make him whole for any earnings he may have suffered by reason of Nazareth's discrimination, and to post appropriate notices (R. 77-79)

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT NAZARETH REGIONAL IS A SUCCESSOR EMPLOYER AND THEREFORE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION, AND BY UNILATERALLY ESTABLISHING THE INITIAL TERMS AND CONDITIONS OF EMPLOYMENT FOR THE TEACHERS

A. Introduction and applicable principles

The labor relations doctrine of successorship is designed to insure that employee rights are not curtailed by ". . . a mere change of employers or of ownership in the employing industry." *N.L.R.B.* v. *Burns International Security Services,* 406 U.S. 272, 279 (1972). For "it is a settled principle that when employees have bargained collectively with an employer and there occurs a change of ownership not affecting the essential nature of the enterprise, the successor employer must recognize the incumbent union and deal with it as the bargaining representative." *Tom-A-Hawk Transit, Inc.* v. *N.L.R.B.*, 419 F.2d 1025, 1026-1027 (C.A. 7, 1969), cited with approval in *N.L.R.B.* v. *Burns Int'l Security Services, Inc., supra,* 406 U.S. at 281. This principle derives, in part, from the statutory policy of promoting industrial stability and, in part, from the presumption that the Union's majority will survive a transfer of managerial authority that does not affect the substantial continuity of the employing enterprise. Thus, in *N.L.R.B.* v. *Burns Int'l Security Services, supra,* the Supreme Court held that the Board could properly require a successor employer to bargain with an

incumbent union where despite the transfer of the business the bargaining unit continued to be "an appropriate one", a majority of the successor's employees had been represented by the incumbent union, and the successor "could not reasonably have entertained a good faith doubt" that the union still represented a majority of the employees. 406 U.S. at 277-278. See also *Zim's Foodliner, Inc.* v. *N.L.R.B.*, 495 F.2d 1131, 1138-1142 (C.A. 7, 1974) cert. denied, 419 U.S. 838; *N.L.R.B.* v. *Interstate 65 Corp.*, 453 F.2d 269, 272-275 (C.A. 6, 1971); *Tom-A-Hawk Transit, Inc.* v. *N.L.R.B., supra,* 419 F.2d at 1027-1028.

Further, where the successor employer retains most of the predecessor's employees and where it makes no major changes in the employing enterprise, the successor employer is obligated to bargain with the previously-selected union because there is no reason to question the continued majority status of the incumbent union. *N.L.R.B.* v. *Burns Int'l Security Services, supra,* 406 U.S. at 280-281; *N.L.R.B.* v. *Armato* 199 F.2d 800, 803 (C.A. 7, 1952). In determining whether a successor employer is obligated to bargain with the union previously selected by a majority of the predecessor's employees, the Board and the courts therefore focus primarily upon the degree to which the successor has retained the predecessor's employees[6] and secondarily upon the extent to which the successor has altered the predecessor's methods of operation. *Zim's Foodliner, Inc.* v. *N.L.R.B., supra,* 495 F.2d at 1140; *Tom-A-Hawk Transit, Inc.* v. *N.L.R.B., supra,* 419 F.2d at 1027.

Where the union has been recognized as the collective bargaining representative for the predecessor's employees, its representative status continues as a rebuttable presumption after the first year of the union's certification until objective facts provide a reasonable basis

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6 "The focus in these duty to bargain cases being whether 'the [union] still represent [s] a majority of the employees,' *Burns,* 406 U.S. at 278, . . . the primary consideration is naturally the work force continuity." *Boeing Co.* v. *International Ass'n of Mach. & Aero. Wkrs.*, 504 F.2d 307, 321 (C.A. 5, 1974). Accord: *Wm. J. Burns International Detective Agency* v. *N.L.R.B.* 441 F.2d 911, 915 (C.A. 2, 1971), aff'd, 406 U.S. 272 (1972); *Zim's Foodliner, Inc.* v. *N.L.R.B., supra,* 495 F.2d at 1140 (employee complement of a purported successor is "the most important element in a successorship determination").

for doubting the union's majority in the successor employer's workforce. *N.L.R.B.* v. *Burns Int'l Security Services, supra,* 406 U.S. at 279, n. 3. See *N.L.R.B.* v. *Auto Vent Shade, Inc.,* 276 F.2d 303, 307 (C.A. 5, 1960) (violation predicated on successor employer's withdrawal of recognition from union certified 7 years before and recognized as employees' bargaining representative since then). See also, *N.L.R.B.* v. *Interstate 65 Corp., supra,* 453 F.2d at 270-271, 275 (union recognized by predecessor on basis of card check in 1962; successor's unilateral changes in employment conditions and refusal to bargain in 1969 held unlawful in the absence of "any reasonable basis" for "alleged 'good faith' doubt of the union's majority representation"); *Tom-A-Hawk Transit, Inc.* v. *N.L.R.B., supra,* 419 F.2d at 1026, 1028 (where union had been recognized as bargaining representative and had negotiated series of collective bargaining agreements for over 30 years, successor's withdrawal of recognition violated Section 8(a)(5) and (1)); *Zim's Foodliner* v. *N.L.R.B., supra; N.L.R.B.* v. *Foodway of El Paso,* 496 F.2d 117, 120 (C.A. 5, 1974).

Finally, the duty to bargain attaches to the successor employer when that employer has hired "a majority of the employees in the unit as required by Section 9(a) of the Act." *N.L.R.B.* v. *Burns Int'l Security Services, supra,* 406 U.S. at 295. The successor employer, once the duty to bargain attaches, is of course subject to the corollary duty not to make changes in wages, hours, or working conditions without giving the union notice and an opportunity to bargain. *N.L.R.B.* v. *Katz,* 369 U.S. 736 (1962). However, because "it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with the union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by Section 9(a) of the Act. . .," a successor employer "is ordinarily free to set initial terms on which it will hire the employees of the predecessor. . . ." *N.L.R.B.* v. *Burns Int'l Security System, supra,* 406 U.S. at 294. Nevertheless, as the Court in *Burns* noted, under some

circumstances a successor employer is required to bargain at an earlier stage (406 U.S. at 294-295):

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

Under these principles, as we show below, the Board properly found that Nazareth Regional High School was the successor to the Hald Association, and thus was obligated to bargain with the Union as the representative of its faculty.

B. The Board properly found that Nazareth succeeded to the Hald Association's bargaining obligation and thus violated Section 8(a)(5) of the Act by not recognizing the Union

Here, as shown in the Statement, *supra,* pp. 3-7 after Nazareth Regional High School began operation on September 1, 1974, an overwhelming majority of its lay teachers had come from the faculty at Nazareth Diocesan. Nazareth Diocesan, as a member of the multi-school Hald Association, had had a continuing bargaining relationship with the Union based on successive collective bargaining agreements, the latest effective through August 31, 1974, the day before Nazareth Regional officially began operations. Nazareth concedes that the contractual status of the Union was known to Nazareth management prior to the reorganization and that there was virtually a complete continuity of operation after the reorganization. Thus, it is evident that the reorganization left "the essential nature of the enterprise" intact. In these circumstances the Board's finding that Nazareth succeeded to the bargaining obligation of the Hald Association is clearly supported by the evidence. Nazareth was therefore obligated to recognize and bargain with the Union as the collective bargaining representative of the lay faculty, and its failure to do so was, as the Board found, a violation of Section 8(a)(5) of the Act. See discussion and cases cited, *supra,* pp. 10-12.

C. The Board properly found that Nazareth violated Section 8(a)(5) by unilaterally establishing the initial terms and conditions of employment for the teachers

Nazareth concedes, as it must, that it unilaterally established the initial terms and conditions of employment for its faculty. What it contests is the Board's conclusion that it was obligated to bargain with the Union concerning the employment contracts sent directly to the teachers. This conclusion is based on the Board's finding that Nazareth planned to retain all of the employees in the unit as of March 25, 1974, and thus the case falls within the exception to the normal rule, as discussed above, pp. 12-13, permitting unilateral establishment of initial terms.

As the Board noted, "The central fact remains that Respondent Nazareth expressed its intention to retain all of the former Hald teachers on March 25, 1974, and subsequently hired almost its entire teaching complement from among these teachers" (R. 70). The evidence abundantly supports this finding. Keenan's assurance to Union President Gordon over the telephone on that date was unambiguous: "We intend to rehire all of the people back. They will be retained next year" (*supra*, p. 5). Keenan had acknowledged himself as chairman of the board of trustees and was responding to the inquiries of a Union official. Nazareth's subsequent actions in faculty recruitment were not substantially inconsistent with this promise. All but six of Nazareth's faculty eventually were recruited from the Diocesan unit. There is, in sum, no substantial evidence to counter the Board's finding that here it was "perfectly clear that the new employer plans to retain all of the employees in the unit." *Burns, supra,* 406 U.S. at 294-295. The Board thus correctly found Nazareth's bargaining obligation to have attached on March 25, 1974, in effect the date Nazareth announced to the Union its plan to retain a majority of the present unit members.

The Company's reliance (Br. 28) on the Board's decision in *Spruce Up Corp.*, 209 NLRB 194 (1974), approved in *Brotherhood of Railway, Etc.* v. *REA Express, Inc.*, 523 F.2d 164, 171 (C.A. 2, 1975), is misplaced. The Board there found a successor employer who had announced new terms simultaneously with his invitation to the previous work force to accept employment under those terms not subject to the "plans to retain" exception, since there could be no assurance a majority of employees would decide to accept the new terms. Here, in contrast, there was no indication that the terms of employment were to be changed until the standard employment contracts were sent to the faculty in April along with the invitation to apply for a position at Nazareth Regional—after Nazareth had announced its intention to rehire everyone. The rule fashioned by the Board in *Spruce Up* does not therefore reach the circumstances here, where the successor employer unilaterally set the initial terms *after* it had assured the Union that all would be retained. See *Spitzer Akron, Inc.* v. *N.L.R.B.*, ___ F.2d ___, 92 LRRM 3007, 3009 (C.A. 6, 1976) (*Burns* exception construed to depend on the timing of the announced changes in terms of employment).

Moreover, the facts shown here strongly tend to establish that the teachers were misled by "tacit inference" into believing they would be retained without change in the conditions of employment. Nothing in Keenan's assurance of March 25 indicated the likelihood of changes in terms of employment, and Gordon testified without contradiction that he communicated the substance of his conversation with Keenan to other Union officials and probably to Mr. Monroe, a member of the Nazareth faculty and the Union delegate there (Tr. 141-148). Such misleading constitutes grounds for application of the *Burns* "plans to retain" exception to Nazareth. *Spitzer Akron, Inc.* v. *N.L.R.B., supra,* 92 LRRM at 3010; *Brotherhood of Railway, Etc.* v. *REA Express, Inc. supra,* 523 F.2d at 171.

Nazareth contends that it had no notice that this issue would be considered as a possible violation of the Act (Br. 25). However, Nazareth failed to bring this objection, alleged lack

of notice in the complaint, to the attention of the Board by failing to take exception on that ground to the finding of the Administrative Law Judge that, "were the Complaint otherwise proved, I would find Nazareth Regional illegally refused to bargain as far back as March 1974" (R. 33). Thus, Nazareth's exceptions to the decision of the Administrative Law Judge specifically excepted only to the Judge's findings on the issues of unilateral establishment of initial terms and deliberate by-passing of the Union in negotiating those terms (R. 56-57, exceptions 8, 9 and 14). Nazareth's brief to the Board dealt extensively with these issues—but made no claim that the Complaint was defective in this respect. Nazareth may not, therefore, raise the issue in this Court. *N.L.R.B.* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961); *N.L.R.B.* v. *Park Edge Sheridan Meats, Inc.*, 323 F.2d 956, 959 (C.A. 2, 1963). It is immaterial that Nazareth had won on this issue on another ground before the Judge, for the Board's rules specifically require the filing of cross-exceptions by Nazareth to preserve its position on this issue inasmuch as Nazareth's opponent was challenging the Judge's holding. *Barton Brands, Ltd.* v. *N.L.R.B.*, 529 F.2d 793, 800-801 (C.A. 7, 1976); *N.L.R.B.* v. *Cast-A-Stone Products Co.*, 479 F.2d 396, 397-398 (C.A. 4, 1973).[7]

In any event, we submit that the Complaint fairly raised the issue. Paragraph 13(a) of the Complaint asserted that Nazareth was responsible in some respects for the operation of the school since January 1, 1974, and paragraphs 16 and 17 specifically alleged a refusal to recognize and bargain with the Union on various dates including March 25, 1974 (R. 9-10). Moreover, the issues surrounding the March 25 telephone call were extensively litigated by the parties at the hearing without any objection by the Company. See *McGraw-Edison*

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[7] *N.L.R.B.* v. *Local 138, Operating Engineers*, 293 F.2d 187, 191-192 (C.A. 2, 1961), and its progeny, e.g., *N.L.R.B.* v. *Local 282, Teamsters*, 412 F.2d 334, 337, n. 2 (C.A. 2, 1969), cert. denied, 396 U.S. 1038, do not require a different result. The *Local 138* case was decided prior to the Board's adoption of its requirement for cross-exceptions in this kind of case and criticized the Board for not making clear in its rules the necessity for such exceptions. In response to the Court's criticism, the Board amended its rules to provide for such cross-exceptions, a clarification which, as noted, other Circuits have approved.

Company v. *N.L.R.B.*, 419 F.2d 67, 77 (C.A. 8, 1969). In these circumstances, the Board properly considered the issue.

D. Nazareth failed to prove that it had a good faith doubt that the Union had retained its majority status at the time of the refusal to recognize or bargain

Nazareth's principal defense to the finding of a Section 8(a)(5) violation is its claim that it had a good faith doubt of the Union's majority status. Its main ground for this assertion is that the single school unit at Nazareth was only a "small segment" of the prior multi-school unit, therefore no mathematical certainty of majority support may be presumed (Br. 20). As exemplified by *Burns*, however, the courts and the Board have often imposed the bargaining obligation in situations where mathematics alone might indicate a reasonable basis for doubting continued majority. Numerous cases hold that employee turnover, standing alone, does not give rise to good faith doubts regarding a union's majority status. See, e.g. *N.L.R.B.* v. *Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091 (C.A. 8, 1969). Likewise, mere diminution in the employee complement of the bargaining unit does not relieve the successor of his duty to bargain. See, e.g., *N.L.R.B.* v. *Armato*, 199 F.2d 800, 803 (C.A. 7, 1952).

Similarly, the presumption of majority status supports the bargaining obligation of the successor even where a transfer of the employing entity results in a division of the bargaining unit into two or more separate, independently appropriate units, so long as a majority of the successor's employees in the new unit at issue were previously employed by the predecessor. *N.L.R.B.* v. *Boston Needham Industrial Cleaning*, 526 F.2d 74, 76-77 (C.A. 1, 1975); *Zim's Foodliner, Inc.* v. *N.L.R.B.*, *supra*, 495 F.2d at 1133-1136, 1138-1142; *Interstate 65 Corp.*, *supra*, 453 F.2d at 272-273; *Ranch-Way, Inc.* v. *N.L.R.B.*, 445 F.2d 625, 627 (C.A.

10, 1971), remanded on other grounds, 406 U.S. 940.[8] Indeed, in *N.L.R.B.* v. *Boston Needham Industrial Cleaning Co., supra,* the Court upheld the Board's determination that a diminution in unit size from a larger multi-employer unit to a 32-employee single plant unit "would not significantly affect employee attitudes," 526 F.2d at 77. For, as the Seventh Circuit held in *N.L.R.B.* v. *Armato, supra,* 199 F.2d at 803, where the sale of an enterprise had reduced the work force from 25 employees to 6, "The fact that [the employees in the new enterprise] found themselves fewer in number than before warrants no implication that they no longer desired the Union to represent them."

These cases show that diminution in unit size in and of itself is not determinative of the union's presumptive majority status, and further show that the proper focus in such diminution cases is on whether the changed employment circumstances under the new employer dictate an alteration of the employees' desire for unionization. See *N.L.R.B.* v. *Interstate 65 Corp., supra,* 453 F.2d at 273 ("Any break in the continuity of the employing industry must be shown by [the employer] to substantially affect the bargaining unit"). Nazareth has made no such showing here.

Nazareth further attempts to support its assertion of good faith doubt as to the Union's majority status with a variety of facts that collectively and individually fail to satisfy Nazareth's burden in this regard. Initially, as both the Administrative Law Judge and the

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[8] The Supreme Court's *Burns* decision requires no revision of these principles. Although the Court there emphasized that non-discriminatory hiring of a different work force by a new owner could break the continuity of the employing enterprise, it did not hold that a majority of the previous work force must necessarily be hired by the successor to provide a continuing bargaining duty. The Court instead clearly indicated its approval of a successorship finding where "a majority of employees *after* the change of ownership... were employed by the predecessor employer," 406 U.S. at 279 (Emphasis added).

This facet of the *Burns* opinion has been noted by the Court of Appeals for the Eighth Circuit. Rejecting the contention that there was insufficient employee continuity where the holdover employees were a majority of the successor's work force, but a minority of the previous bargaining unit, the court stated, "Under *Burns* it is the number of new employees and whether they are a majority that is important. The fact that the four [holdover] employees were not a majority... [of the predecessor's work force] is persuasive but not decisive." *N.L.R.B.* v. *Polytech, Inc.*, 469 F.2d 1226, 1230 (C.A. 8, 1972).

Board noted (R. 41, 65-66), it is significant that Nazareth did not assert any doubts about the majority status of the Union at the times it refused to recognize it. Instead the issue of majority status was raised for the first time at the hearing before the Administrative Law Judge. Nazareth's failure to respond to any of the Union's requests for recognition and its failure to give majority status as the basis for its actions at the time is not consistent with actual good faith doubt at those times. *N.L.R.B.* v. *Howe Scale Company,* 311 F.2d 502, 505 (C.A. 7, 1963).

Secondly, none of the factors urged by Nazareth would in any event justify a good faith doubt of the Union's majority. Thus, Nazareth relies (Br. 23) upon the decision of approximately 20 teachers to cross the picket line in October 1973, and upon the decision made by the Union membership in April of 1974 not to strike, as support for its doubt of majority support. These decisions, however, simply are not relevant to the desire of the teachers to be represented by the Union; they merely reflect opinions about what were appropriate Union tactics in a given situation. It is therefore well settled in this Circuit and elsewhere that such decisions do not amount to an objective showing of lack of majority support for Union representation. *Retired Persons Pharmacy* v. *N.L.R.B.*, 519 F.2d 486, 490 (C.A. 2, 1975).

Furthermore, while Nazareth relies upon the 18 written resignations of teachers from the Union introduced as evidence (Br. 23-24), it fails to note that eight of those were submitted *after* it failed to respond to the March and June 1974 demands of the Union and seven after the September 1 opening of classes (A. 151-158). Clearly, these events are irrelevant to a determination of Nazareth's state of mind at the time it refused to recognize the Union. See *N.L.R.B.* v. *Gulfmont Hotel Company,* 362 F.2d 588, 589 (C.A. 5, 1966) (the determination of an issue of good faith doubt of majority "is not controlled, or even guided, by the later ascertained facts of union adherence and non-adherence. It is rather the question

of fact whether the Company has a reasonable basis at the time of its refusal to bargain for believing that majority support of the bargaining union no longer existed"). Moreover, a total of 42 teachers (of 63 total) were having union dues checked off by Hald in April of 1974 (G.C. Ex. 26), after the ten earlier resignations had become effective, so that none of the resignations provide any basis, at the time of the refusal, for doubting the majority support of the Union among the Nazareth Diocesan faculty.[9]

Finally, Nazareth relies on the faculty signatures on the letter of June 3, 1974, which expressed disagreement with an earlier Union communication to the parents of the students, and on the October 16, 1974, decertification petition as evidence of Union disaffection. Like the resignations, however, both of these incidents occurred after Nazareth's refusal to bargain and are therefore immaterial. Moreover, because Nazareth supervisors committed unfair labor practices in preparing and soliciting signatures on these documents,[10] Nazareth cannot rely upon them as evidence of a valid good faith doubt.[11] Further, as the Board noted (R. 66), "the June 3 letter merely expressed certain teachers' disagreement with a particular union action" and consequently cannot support a serious claim for doubting majority status. *Retired Persons Pharmacy* v. *N.L.R.B., supra,* 519 F.2d at 490.

In contrast to these obviously post-hoc rationalizations supporting a good faith doubt advanced in Nazareth's brief, the total record supports the inference that the actual legal

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[9] Of the 38 nonsupervisory lay teachers at Nazareth Regional who had come from the Nazareth Diocesan faculty, 26 were paying dues to the Union through this checkoff arrangement in the spring of 1974 (R. 65).

[10] See pp. 28-30, *infra.*

[11] The Supreme Court established early in the history of the Act that employer unfair labor practices tending to dissipate union adherence would vitiate the employer's otherwise lawful refusal of recognition because the employer "cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will." *Medo Photo Supply Corp.* v. *N.L.R.B.*, 321 U.S. 678, 687 (1944); *N.L.R.B.* v. *A. W. Thompson, Inc.*, 449 F.2d 1333, 1336 (C.A. 5, 1971), cert denied, 405 U.S. 1065.

basis for Nazareth's refusal to recognize or even respond to the Union's demand was only the belief that it could avoid becoming successor to the Hald Association's bargaining obligation. As both the Administrative Law Judge and the Board found, Principle Burke's clear intent "was to take advantage of the occasion of the change-over to get rid of the Union" (R. 32, 47, 71). In this circumstance, and on the basis of the entire record, the Board correctly concluded that Nazareth failed to meet its burden of proving a good faith doubt of the Union's majority.

E. Nazareth's other defenses are without merit

1. Past participation of a minor supervisor in the Union leadership

Union delegate and treasurer Stephen Monroe was, by agreement of the parties, a supervisor at Nazareth High School both before and after the reorganization. His position as coordinator of the business department included some supervision over one other business teacher (R. 34-35; Tr. 76-77, 83, 86-87). Monroe resigned his leadership positions in the Union during the course of the hearing before the Administrative Law Judge in June 1975 (G.C. Ex. 28).[12] Nazareth argues that such past participation bars issuance of a bargaining order either on the theory that the Union is dominated by supervisors and thus incapable of functioning as a collective bargaining representative or that the Union's initial recognition demand was faulty because it included such supervisors.

Neither contention has merit. As to the domination issue, it is clear that whether or not a labor organization is competent to represent a group of employees in collective bargaining with their employer is a determination which Congress left primarily to the judgment of the employees themselves to be determined by majority rule. "Thus, . . . in proceedings under 9(c) of the Act, [the Board] do[es] not ordinarily consider issues as to the character

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[12] Nazareth also relies on the participation in Union leadership, as vice-president, of a supervisor from another Hald Association school. This supervisor, who also resigned during the course of the hearing, was never employed by Nazareth and was therefore outside the unit at issue. See, e.g., *Carle Clinic Association,* 192 NLRB 512, 513A n. 5 (1971).

and activities of the labor organizations seeking certification as the collective bargaining representative of employees affected by the proceedings." *Rochester and Pittsburgh Coal Co.*, 56 NLRB 1760, 1763-1764 (1944). However, the Board has also long held that ". . . where the facts are admitted and their import is unmistakable, . . . a place on the ballot in any election conducted by the Board [will not be accorded] to a labor organization which is not capable of dealing on behalf of ordinary employees at arm's length with their employer." *Rochester and Pittsburgh Coal, supra.*

"The principle [underlying this exclusionary rule is] . . . that an organization dominated by an employer [is] incapable of consideration as bargaining representative because of its inherent inability to bargain at arm's length." *Columbia Pictures Corp.*, 94 NLRB 466, 469 n. 7 (1943). This rule, therefore, is nothing more than the embodiment of the same principles which make employer domination of a labor organization an unfair labor practice.[13] See, *N.L.R.B* v. *Link-Belt Co.*, 311 U.S. 584 (1941); *N.L.R.B.* v. *Pennsylvania Greyhound*, 303 U.S. 261, 269 (1938); *Utrad Corp.* v. *N.L.R.B.*, 454 F.2d 520 (C.A. 7, 1971). Thus, the Board disqualifies a labor organization from seeking certification if there is "unmistakable" proof either that supervisors of the employees in the unit sought dominate or control that organization's administration or formation,[14] or that supervisors were responsible for the solicitation of rank and file support.[15]

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[13] Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization. . . ."

[14] *Brunswick Pulp and Paper Co.*, 152 NLRB 973 (1965) (local union disqualified where by-laws gave exclusive right to be officers of local and to control its affairs to "producers" who were either independent contractors or supervisors); *N.Y. Omnibus Corp.*, 104 NLRB 579, 584 (1953) (93 of 113 members as well as president of union were supervisors employed by the employer); *Columbia Pictures Corps.*, 94 NLRB 466, 470 ("petitioner is predominantly composed by supervisors and . . . these supervisors have materially participated in the organization of the employees herein. [footnote omitted]"); *Rochester & Pittsburgh Coal, supra* (supervisory members of the organization outnumbered employees and controlled the union's policies and practices); *Douglas Aircraft Co.*, 53 NLRB 486 (1943) (labor organization conceived and organized by a supervisory employee).

[15] *Toledo Stamping and Manufacturing Co.*, 55 NLRB 865 (1947) (petitioning union's showing of interest was secured through the assistance of a supervisor). Accord: *Alaska Salmon Industry, Inc.*, 78 NLRB 185 (1948).

However, the Board does not equate the simple fact of supervisory membership in a labor organization with an "unmistakable" showing of "employer domination," and does not apply its exclusionary rule, where ordinary employees have substantial participatory rights in that organization's affairs and comprise a majority of its membership. See *International Paper Co.*, 172 NLRB 133 (1968); *Pacific Far East Lines, Inc.*, 174 NLRB 1168 (1969); *Carle Clinic Assoc*, 192 NLRB 512 (1971); *Oak Ridge Hospital of United Methodist Church*, 220 NLRB No. 9 (1975), 90 LRRM 1217. In such situations it is of no consequence that supervisors of employers other than the one involved in the representation proceeding occupied positions of authority within the labor organization's hierarchy. As the Board stated in *International Paper Co., supra*, 172 NLRB at 133, in rejecting the supervisory domination argument advanced by the employer (emphasis supplied):

> Although Petitioner [the Alabama Nurses Association] does have supervisors as members and supervisors serve on the board of directors, the record indicates substantial participation by the employee members in the affairs of petitioner, and that *no employer supervisors [of] employees are presently serving on the board of directors.* Further, we note that petitioner stated in uncontroverted testimony, that should it be certified, goals and negotiations involving the unit herein would be determined and pursued solely by members of the unit. (Emphasis supplied.)

Accord: *Yeshiva University*, 221 NLRB No. 169, 91 LRRM 1017, 1018 (1975) (union not disqualified by organizational activities of three supervisors "in light of substantial employee participation"); *St. Rose de Lima Hospital*, 223 NLRB No. 224, 92 LRRM 1181, 1182-1183 (1976) (union not disqualified even though some officers in the past were supervisors since "at the present time none of [the Union's] officers or directors is employed by the employer in a supervisory capacity").

We submit that the Board's rationale in so fashioning and limiting this exclusionary rule is eminently sound and provides no basis for disqualifying the union in the present case. For where a labor organization's certification will not perforce place "the employer . . . on

both sides of the bargaining table" (*N.L.R.B.* v. *Mt. Clemens Metal Prod.*, 287 F.2d 790, 791 (C.A. 6, 1961)), there is no legitimate basis for depriving the employees of their fundamental statutory right to free choice in the selection of a bargaining representative. Here, there is no showing of substantial supervisory participation in either organization or membership; at most, there is only the past participation of a supervisor in a leadership capacity, a problem which has now been corrected by the resignation of that person from his position. There is, then, no present basis for finding the Union disqualified at this time. And any future intrusions by the employer's supervisors into the unit employees' bargaining can be remedied, if and when they arise, under the Board's unfair labor practice machinery without destroying what is an otherwise sound and legitimate collective bargaining relationship. *E.g.*, *Nassau and Suffolk Contractors Ass'n,* 118 NLRB 174 (1957), cited with approval in *Mon River Towing, Inc.* v. *N.L.R.B.*, 421 F.2d 1, 6-7 (C.A. 3, 1969); *Jeffrey Mfg. Co.*, 208 NLRB 75 (1974);

As to the contention that the Union's recognition demand was faulty because it included supervisors, the facts show that Nazareth never until the hearing relied on this argument as a reason for its refusal to bargain with the Union. It is well settled in this Circuit and elsewhere that Nazareth's failure in this respect precludes reliance on the claim now. *Colecraft Manufacturing Co., Inc.* v. *N.L.R.B.*, 385 F.2d 998, 1006 (C.A. 2, 1967) (inclusion of insubstantial number of ineligible persons in recognition demand not fatal "where the employer failed to ground its refusal to recognize the union upon the inappropriateness of the demanded unit").

2. Exclusion of the religious faculty from the bargaining unit

Nazareth contends (Br. 29-33) that the bargaining order herein is not supportable because the unit for bargaining found appropriate by the Board improperly excludes the religious faculty. This contention was also correctly rejected by the Board.

It is well settled that Congress has entrusted a wide degree of discretion to the Board in making unit determinations.[16] In determining whether certain employees should be grouped together for collective bargaining, the central concern is whether or not the employees share a community of interest, and hence may constitute a viable bargaining unit. "First and foremost is the principle that mutuality of interest in wages, hours, and working conditions is the prime determinant of whether a given group of employees constitutes an appropriate unit." *Continental Baking Company*, 99 NLRB 777, 782 (1952). The Board also looks to bargaining history as evidence in this connection, for bargaining history may establish whether a particular grouping is in fact successful.

It is also well settled that in any given factual situation there may be more than a single way in which the employees may appropriately be grouped for purposes of collective bargaining. However, the statute in such a case does not require that the unit designated by the Board be a "more" appropriate unit or the "most" appropriate unit but simply that the unit be an appropriate one. As this Court held in *Wheeler-Van Label Co.* v. *N.L.R.B.*, *supra*, 408 F.2d at 617:

> The question before us is not whether the composing area unit is the *only* unit for these employees. The Board's duty is to choose *an* appropriate unit, and it may select among several appropriate ones. [Emphasis in original].

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[16] As this Court stated in *Wheeler-Van Label Company* v. *N.L.R.B.*, 408 F.2d 613, 616-617 (C.A. 2, 1969), cert. denied, 396 U.S. 834:

> [A] company undertakes a sizeable burden in arguing that the unit found was not an appropriate one; there can be no dispute that the Board has considerable leeway in exercising its judgment under section 9(b) of the Act . . . as to the appropriateness of a given unit. A unit finding by the Board "involves a large measure of informed discretion," *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485 . . . (1947), and, where it is supported by substantial evidence, will not be reversed "in the absence of an 'arbitrary or capricious exercise of administrative discretion,'" *Empire State Sugar Co.* v. *N.L.R.B.*, 401 F.2d 559, 562 (C.A. 2, 1968).

Where, therefore, the Board correctly finds that the unin in question is an appropriate one, its finding is entitled to stand on review even though it might properly have found other units to be appropriate as well. As the First Circuit expressed it in *Banco Credito y Ahorro Ponceno* v. *N.L.R.B.*, 390 F.2d 110, 112 (C.A. 1, 1968), cert. denied, 393 U.S. 832, the employer "at this appellate stage faces a most difficult task. It cannot succeed only by demonstrating that [another] unit would be appropriate but must also show that [the] unit [designated by the Board] is clearly not appropriate."

The Board's exclusion of religious teachers from the bargaining unit is supported by both tne history of successful bargaining by the lay teachers with the Hald Association and the dramatic differences in wages paid lay and religious teachers. Since its inception, the Union, with the consent of Nazareth's predecessor, has excluded religious teachers (Tr. 58), and the Union sought recognition from Nazareth for a unit consisting only of the lay teachers. The religious teachers are each paid a salary of $6200 annually, or about half of the average salary for lay teachers (Tr. 61). In addition, religious teachers take vows of poverty and obedience and are furnished living accomodations in the school at no cost (Tr. 57, 61, 64). These factors clearly distinguish the religious faculty from the lay faculty and warrant excluding them from the unit in issue.

Contrary to Nazareth's contention (Br. 32), the Board is not following an arbitrary policy of excluding religious faculty in every instance; rather, the Board is proceeding on a case-by-case basis. The Board's exclusion of the religious teachers from the unit was essentially based on its earlier decision in *Seton Hill College*, 201 NLRB 1026 (1973). *Seton Hill* involved an Order of sisters which owned and administered the College at which its members taught; which paid its religious faculty much less than the lay teachers; and which provided free living accomodations for religious teachers. In addition, the sisters had taken vows of proverty and obedience. On these facts, the Board decided to exclude the sisters on two

grounds: (1) because the sisters, as a result of their relationship to the college, would "be subject to a conflict of loyalties," and (2) "the economic interests of the lay faculty and the sisters do not coincide." 201 NLRB at 1027. While it appears to be true, as Nazareth contends (Br. 31), that there is no problem here of conflict of loyalties, it is also clear that the economic interests of the lay and religious faculty in this case are just as divergent as those involved in the *Seton Hill* case. The Board, therefore, was plainly justified in relying on *Seton Hill* to reject Nazareth's claim that the religious must be included in the bargaining unit. The Board will, however, include religious faculty members in a unit when the circumstances of a case so dictate. See, e.g., *D'Youville College*, 225 NLRB No. 104, 92 LRRM 1578, 1579 (1976), where the Board combined the religious and the lay faculty, noting that in that case there was no conflict of loyalties and the parties consented to inclusion. Here, of course, the latter factor is absent. Nonetheless, the case does show that the Board is not following an arbitrary policy in this area but is rather examining the facts of each case in order to determine the appropriate grouping for the employees in dispute.

Finally, the Board's action in determining that a unit of lay faculty was an appropriate one does not constitute religious discrimination against the excluded Brothers, as Nazareth asserts (Br. 31-33). While the freedom to hold religious beliefs is of course absolute under the First Amendment, Nazareth has not even attempted to show how the Board's unit determination impinges on the freedom of anyone to believe what he may wish. Nor could such a showing be made on this record. And there can be no serious dispute that the religious faculty were excluded not because of their beliefs but solely because of their differing economic interests, a ground which, as we have already shown *supra*, p. 25, has been universally approved since the Act was first enacted. In these circumstances, it is apparent that the case presents no First Amendment problems.

In sum, the Board's determination that the nonsupervisory lay faculty constitute an appropriate unit for bargaining provides no justifaction for Nazareth's refusal to bargain and does not bar this Court from enforcing the Board's bargaining order against Nazareth.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT NAZARETH VIOLATED SECTION 8(a)(1) OF THE ACT BY THE CONDUCT OF SUPERVISORS IN CIRCULATING ANTI-UNION LETTERS AND A DECERTIFICATION PETITION, AND IN THREATENING THE TEACHERS' FREEDOM TO ENGAGE IN UNION ACTIVITIES DURING A FACULTY RELIGIOUS SERVICE

As set forth *supra,* pp. 5-6, there is no dispute as to the facts surrounding the drafting and soliciting of faculty signatures on the anti-union letter sent to parents on June 3, 1974, the similar circulation of a petition dated October 16, 1974, in support of a decertification petition, or the filing of a decertification petition on October 18, 1974. Nazareth does not question the fact that these documents were drafted and circulated for signature in each case by departmental chairmen, stipulated to be supervisors under the Act, or the fact that each document was anti-union in character. The only issue contested is whether the Board had a basis in the record for concluding that such actions were coercive and thus violative of the Act (Br. 34-37).

The Board properly so found. As an initial matter, supervisory participation in the promotion of a decertification proceeding is inherently destructive of employee rights. An employer's suspicions that his employees may be disenchanted with their bargaining agent "do not justify employer self-help" in bringing that relationship to an end. *Brooks* v. *N.L.R.B.,* 348 U.S. 96, 103 (1954). It is coercive by its very nature, and thus unlawful, for an employer to instigate and promote a decertification proceeding or to assist in the initiation and circulation of a decertification petition. *N.L.R.B.* v. *Sky Wolf Sales, Inc.,* 470 F.2d 827 (C.A. 9, 1972); *N.L.R.B.* v. *Birmingham Publishing Co.,* 262 F.2d 2, 7 (C.A. 5,

1958); *Amalgamated Clothing Workers of America* v. *N.L.R.B.*, 424 F.2d 818, 824 (C.A.D.C., 1970), and cases cited therein; *Imperial Outdoor Advertising*, 192 NLRB 1248, 1257 (1971), enf'd, 470 F.2d 484 (C.A. 8, 1972); *Big Ben Department Stores, Inc.*, 160 NLRB 1925, enf'd, 396 F.2d 78 (C.A. 2, 1968); *Suburban Homes Corporation*, 173 NLRB 497 (1968). Moreover, it is also well settled that an employer cannot escape responsibility for the acts of its supervisors on the ground that it was unaware of them or did not specifically authorize them. "To rule otherwise would provide a simple means for evading the Act by a division of corporate personnel functions." *Allegheny Pepsi-Cola Bottling Company* v. *N.L.R.B.*, 312 F.2d 529, 531 (C.A. 3, 1962). Accord: *United Aircraft Corporation* v. *N.L.R.B.*, 440 F.2d 85, 92 (C.A. 2, 1971); *Riggs Distler & Company* v. *N.L.R.B.*, 327 F.2d 575, 579 (C.A. 4, 1963); *N.L.R.B.* v. *E.D.S. Corporation*, 466 F.2d 157, 158 (C.A. 9, 1972). Thus, it is immaterial that, as Nazareth argues (Br. 36), the supervisors in question may be "in the unit," particularly since Nazareth, an openly anti-union employer, never at any time repudiated or disavowed the actions of the supervisors. Further, the inference of coercion is confirmed by the evidence given by teacher Rose Vitelli, who testified that she did not know at the time she was asked by a supervisor to sign the June 3 letter whether she would be rehired, and that she signed the letter because she was afraid of not being rehired (R. 67).[17]

Although Nazareth contends that "it is plainly impossible for Nazareth to have violated Section 8(a)(1) on June 3, 1974" because Hald was still operating the school at that time (Br. 35), this argument assumes that Nazareth had no role in the employment relationships of the faculty prior to September 1. This was demonstrably not the case, particularly in view of the dual position of Principal Burke as a central figure in the management of both

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[17] The Board also cited her testimony to support its inference that the letter was being used as part of an anti-union campaign by management, since she was informed by a supervisor, who otherwise would be in no position to know, that she had in fact been rehired by Nazareth (Tr. 179-185). *Montgomery Ward & Co., Inc.*, 115 NLRB 645 (1956), enf'd 242 F.2d 497 (C.A. 2, 1957), cert. denied, 355 U.S. 829.

predecessor and successor employers. In any event, the circumstances, including Nazareth's promise—subsequently fulfilled—to rehire everyone, could have reasonably led the employees to believe that the supervisors, even if technically not yet employed by Nazareth, were acting on Nazareth's behalf. The Board, therefore, properly held Nazareth liable for their actions.

Similarly, Nazareth does not contest the fact that Principal Burke, during a faculty religious service the day before classes began at Nazareth Regional, made reference to the strike of the preceeding year and stated that in the future any such activities "will be dealt with swiftly and severely" (*supra*, pp. 7-8). Such a statement is plainly violative of the Act, see, e.g., *N.L.R.B.* v. *A. Lasaponara & Sons, Inc.*, F.2d , 93 LRRM , slip opinion, pp. 5505-5507 (C.A. 2, No. 75-4215, decided September 13, 1976), and as the Administrative Judge correctly noted, "religious conviction, however sincere, does not license intimidation of employees in their freedom to exercise the statutory privilege of collective bargaining. See *Cap Santa Vue* v. *N.L.R.B.*, 424 F.2d 883 (C.A.D.C., 1970), *Good Foods*, 195 NLRB 418 (1972)" (R. 42). Accordingly the Board properly found that this threat to the faculty members by management violated Section 8(a)(1) of the Act as well.

III. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT NAZARETH VIOLATED SECTION 8(a)(3) OF THE ACT BY ITS DECISION NOT TO RENEW THE CONTRACT OF TEACHER AND UNION ACTIVIST JAMES MIRRIONE, AT LEAST IN PART BECAUSE OF HIS UNION ACTIVITIES

The sole question presented with respect to Nazareth's decision not to rehire teacher and union activist James Mirrione is one of motive—i.e., is there substantial record evidence to support the Board's finding that this decision was prompted, at least in part, by his union activities. The unlawful motivation need not supply the sole cause for the decision not to renew Mirrione; rather, as long as his union activities were "a factor" in that decision, a violation

is made out. See *N.L.R.B.* v. *Advanced Business Forms Corp.*, 474 F.2d 457, 464 (C.A. 2, 1973).[18]

Since direct evidence of anti-union motivation is "seldom attainable," the Board may infer unlawful intent from the circumstances surrounding the decision. *N.L.R.B.* v. *Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 295 (C.A. 2, 1972); *N.L.R.B.* v. *Dorn's Transportation Co.*, 405 F.2d 706, 713 (C.A. 2, 1969). Finally, the determination of an employer's motivation is committed in the first instance to the Board, and the Court's role in reviewing a Board finding of unlawful motivation is a narrow one. *United Aircraft Corp.* v. *N.L.R.B.*, *supra*, 440 F.2d at 93; *N.L.R.B.* v. *Advanced Business Forms Corp.*, *supra*, 474 F.2d at 464. As shown below, there is ample evidentiary support for the Board's finding of discriminatory motive in the instant case.

The record shows (*supra*, pp. 8-9) that Mirrione was an active participant in Union affairs, a Union officer, and a visible leader on the picket line during the 1973 strike. As the Administrative Law Judge stated: "[Mirrione] was a publicized participant for the least" (R. 44). As a consequence, there is no question that Burke, who refused to rehire Mirrione, was well aware of his pro-strike and other Union activities. Burke had otherwise demonstrated hostility to the Union in his refusals to cooperate with the Union in furnishing information, his rejection of faculty applications to Nazareth Regional which made reference to union representation, and his threats to the faculty in the religious service. These actions support the Board's conclusion that Burke's clear intent was "to take advantage of the changeover to get rid of the Union" (R. 71). In addition, when Mirrione in March 1974 attempted to persuade the other teachers to refuse to participate in the "mini-marathon"

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[18] Thus, the existence of a contemporaneous legitimate ground for the employee's discharge affords no defense to the finding of an unfair labor practice where substantial record evidence demonstrates that unlawful reasons also played a part in the termination. See, e.g. *United Aircraft Corp.* v. *N.L.R.B.*, 440 F.2d 85, 91-92 (C.A. 2, 1971); *N.L.R.B.* v. *Gladding Keystone Corp.*, 435 F.2d 129, 131 (C.A. 2, 1970).

because of the School's refusal to bargain with the Union, Burke wrote Mirrione a letter stating that he would not "tolerate" such behavior. When Mirrione, suspecting he was being discriminated against, went to Burke to ask why he had not been informed of his status for the coming year, Burke would only repeat, "the board of trustees has not offered you a position," before walking out of the office. Such a "refusal to tell [him] the reason for his discharge was a circumstance which might alone . . . be enough to support an inference that the [discharge] was discriminatory." *N.L.R.B.* v. *Plant City Steel Corp.*, 331 F.2d 511, 515 (C.A. 5, 1964). Subsequently Keenan wrote Mirrione a one line letter stating that were no available positions at Nazareth for the coming year. When two openings did occur in Mirrione's department in October of 1974, however, Burke again rejected Mirrione's application with the response that no jobs were available. This evidence amply supports the Board's findings that Mirrione was not employed or re-employed, at least in part, because of his Union activities. *N.L.R.B.* v. *Jack La Lanne Management Corp.*,_F.2d_, 92 LRRM 3601, 3602 (C.A. 2, No. 75-4205, decided July 27, 1976) (prior unfair labor practices and threats to Union adherents support Board's findings).

Nazareth contends (Br. 44-46) that Mirrione was not rehired solely because of a variety of alleged work shortcomings. Even assuming, however,that these factors played some role in Nazareth's decision, the evidence set out above makes it clear that Mirrione's Union activity was also a contributing factor. Indeed, Burke admitted as much at the hearing. Thus, after Mirrione had taught at Nazareth Diocesan for one year and had received favorable evaluations of his teaching, Burke decided to renew him for the following year and directly complemented Mirrione on his performance. Yet, as Burke testified, after Mirrione's picketing activities the following September, it was "subsequent to the strike that I became more convinced that I had made a mistake by taking him back before the strike" (R. 75; Tr. 773).

Nazareth also contends (Br. 40-41) that the Board is time-barred by Section 10(b) of the Act from finding the refusal to employ or re-employ Mirrione unlawful inasmuch as the charge attacking this action was filed on December 23, 1976 (R. 3), more than six months after Mirrione was first notified in June that he would not be re-hired.[19] As the Board noted (R. 75-76), however, the refusal to re-employ Mirrione did not become effective until September, and consequently Mirrione could not know for certain until that date that he would be denied employment. Since September was within the limitations period, Section 10(b) is not a bar. See *N.L.R.B.* v. *New Mexico Dist. Coun. of Carpenters,* 454 F.2d 1116, 1119-1120 (C.A. 10, 1972). See also *New York Dist. Coun. No. 9, Painters* v. *N.L.R.B.*, 453 F.2d 783, 786 (C.A. 2, 1971), cert. denied, 408 U.S. 930. Further, in October Mirrione applied for two positions in the Theology Department, which in effect constituted applications for "new" employment rather than merely reinstatement to his former position. It is well settled that applications of this sort are not barred by Section 10(b) even if the original refusal to rehire was so barred. *N.L.R.B.* v. *Textile Machine Works, Inc.*, 214 F.2d 929, 931-935 (C.A. 3, 1954); *N.L.R.B.* v. *Albritton Engineering Corp.*, 340 F.2d 281, 285 (C.A. 5, 1965), cert. denied, 382 U.S. 815. In any event, the original charge in this case, which was filed on May 28, 1974 (R. 1), prior to the first notice to Mirrione that he would not be rehired, alleged in general terms that Nazareth was "discharging" employees for anti-union reasons. When read in light of the subsequent December charge specifically attacking the discrimination against Mirrione, this charge is sufficient by itself to support the Board's findings. *N.L.R.B.* v. *Gaynor News Co.*, 197 F.2d 719, 721-722 (C.A. 2, 1952), aff'd on this point, 347 U.S. 17, 34, n. 30 (1954). And since Mirrione's termination was similar to the actions alleged in the initial charge, see *N.L.R.B.* v. *Jack La Lanne Management*

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[19] Section 10(b) provides, in part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board . . . ."

Corp., supra, 92 LRRM at 3602-3603, it is immaterial that the discrimination against him followed rather than preceded that charge, *N.L.R.B.* v. *Fant Milling Co.*, 360 U.S. 301, 305-309 (1959).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment denying the Petition for Review and enforcing the Board's order in full.

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September 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NAZARETH REGIONAL HIGH SCHOOL,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 76-4076
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.
this 29th day of September, 1976.